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Legal Questions in Perspective

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LEGAL QUESTIONS IN PERSPECTIVE*

JUSTICE JOHN PAUL STEVENS

Some years ago, during an informal session with a group of high school students, I was asked a simple, straightforward question: "What is justice?" I do not recall my answer. I do recall, however, that the following summer Dean D'Alemberte and I spent two weeks in Aspen, Colorado, participating in a seminar on the subject of "Justice." I had hoped that the seminar would provide me with the ability to respond to a simple question with a simple straightforward answer. Instead, we found that different scholars viewed justice from different perspectives—that they wrote about social justice, criminal justice, racial justice, distributive justice, and other dimensions of justice more often than they wrote about the central concept itself. Your Dean and I knew more about justice at the end of the seminar than we did before it started, but I am not sure either of us was provided with the kind of answer the high school student sought.

Today we are dedicating a magnificent new law library. It is a place where citizens, law students, practicing lawyers, and judges will be able to learn something about the law. Perhaps they can also find the answer to a question like "What is justice?" or even, "What is law?" Because the search for answers to questions of that kind has a way of linking the past with the present and the future, it occurred to me that it might be appropriate to tell you a few of the things that I have learned about the law from four different perspectives—as a citizen, as a law student, as a lawyer, and as a judge—and then to make a brief observation about the future of a legal topic of special interest to your Dean—televising appellate court proceedings.

I started law school more than four years after I graduated from college. For a significant part of my life—well over a third—I therefore viewed the law from the perspective of the average citizen. I recognized that the law provides a set of substantive rules

* Address delivered at the dedication of the Law Library Building and Rededication of the College of Law Building, Florida State University, January 26, 1985.

defining standards of conduct and prescribing the punishment that may be imposed for violating those standards. In retrospect, I now realize that my first vision of the law was one that might well have been satisfied by using mathematicians and computer programmers to administer the entire system. Appropriate software could have linked the command "thou shall not speed" to a responsive fine measured by the difference between the driver's actual speed and the permitted speed.

But even with my rather one-dimensional understanding of the law, I recognized that the American legal system did not merely impose substantive restraints upon the citizen, but also imposed similar restraints upon those who wield the powers of government. For the average American citizen, law is not entirely a matter of duty; it also creates and protects rights and preserves a measure of individual liberty not only against encroachment by other private citizens, but also against the sovereign itself. We are governed by rules of law—not by the will of men, even of men of good will.

In law school, instead of just studying a set of rules, we were confronted with a multitude of specific cases in which the facts, and the arguments of counsel, often seemed more important than the law. Controversies arose out of situations that the rulemakers had not fully anticipated and in which decent men could reasonably take contrary positions. How should the loss be shared when a partially completed house is struck by lightning and the building contract is silent on the question? Who is responsible for a collision between a stray bull and a car on a foggy evening? The law provides the machinery for answering such questions and thus resolving serious disputes in an impartial and reasonably peaceful way. The performance of that highly important social function is guided by the decisions that have been made in the past, minimizes the likelihood of violent self-help in the present, and provides guidance for future conduct and future decisionmaking. Law school taught me that the law has both a dynamic and a practical dimension that can accommodate unexpected as well as familiar factual patterns.

As a practicing lawyer, I was struck by the importance of the procedural dimension of the law. Rights can be lost if a complaint is not filed before the statute of limitations runs, if a deed is not recorded before the grantor files for bankruptcy, or if a proof of loss does not comply with the conditions of an insurance policy. Probative evidence of a crime may be admitted if its seizure was authorized by a judicial warrant and may be excluded if the police

acted independently. Some personal injury claims will succeed if the defendant has the burden of proving the plaintiff's contributory negligence, but would fail if the State imposed the burden of proving an absence of contributory negligence on the plaintiff. Even a faultless defendant may prefer to settle rather than to litigate in a hostile, distant forum. The difference between procedure and substance is not always entirely clear, but it is clear that procedural questions resolve a host of controversies.

When I became a federal appellate judge I was repeatedly surprised to find how often the outcome of an appeal depended on the determination of the proper decisionmaker rather than a determination about what the proper decision should be. Is the issue one that should be decided by the shareholders of a corporation or by its board of directors? Did a lawyer have the authority to waive his client's right to testify? Should the question whether a falsehood was published with malice be decided by a judge or by a jury? To what extent does an appellate court have the authority to make its own appraisal of the record instead of accepting the trial court's answer, or perhaps the answer provided by an administrative agency? Must a federal judge accept a state judge's evaluation of an issue or is it one that the federal court must interpret independently? Should the Tennessee Valley Authority, the Secretary of the Interior, or perhaps the Congress decide whether to complete a dam that might extinguish the snail darter? The division of authority between state and federal sovereigns and among the legislative, executive, and judicial branches of government, as well as the intricacies of the judicial process itself, make the question "Who shall decide?" one that arises over and over again.

Sometimes it is useful to consider the different dimensions of questions of law. The State of Florida, like many but not all American states—and like few European states—has a statute authorizing capital punishment for aggravated murder. The citizens of the State have made the basic substantive decision that it is good social policy to have such a law. Law students, more than the average citizen, recognize that the administration of such a law in particular cases in which various mitigating circumstances must be balanced against the aggravated character of the defendant's conduct inevitably create some risk that bolts of lightning will strike defendants who are less culpable than those who are spared. But practicing lawyers are most likely to perceive that the relatively large number of persons on Florida's death row is probably a consequence of a procedural defect in your statute. Your law, unlike

those of virtually every other State that authorizes capital punishment, divides the sentencing process into two stages. After the first stage, the jury makes a recommendation of either life or death. After the second stage, the trial judge decides either to accept or to reject the jury's recommendation. We have been told that judges quite regularly accept the jury's recommendation when it is death, but that they have overridden the jury's recommendation of life in almost a hundred cases. In practice, therefore, a procedure that was probably intended by the legislature to provide the defendant with two chances to obtain mercy seems actually to have provided the prosecutor with two opportunities to obtain the death penalty. A comparison of Florida's experience with this statute with the way other States have allocated the decisionmaking responsibility in death cases may shed more light on the law than a debate limited to the basic substantive question itself.*

Two months ago the news media reported that the Florida Supreme Court has authorized the installation of two permanent television cameras to videotape its court sessions. I understand that a complete set of the tapes will be stored in one of the archives of the Law Library that we are dedicating today. I suppose some of those tapes will be used to teach law students how *not* to present an appellate argument, some may be used to teach them the virtues of certain styles of advocacy, and some may provide an interesting historical perspective about the judicial process and how it functioned in particular cases. A development of this kind will surely cause other appellate courts to watch with great interest to see what they can learn from Florida's experience.

During the past year, three Members of the United States Supreme Court have been interviewed on national television and one Member of the Court held a press conference in which he expressed his opinion that it would not be constructive to televise our proceedings. Because this is a subject that will surely be discussed further, I would like to suggest that, like Justice and the Law, it has more than one dimension and can be approached from more than one perspective.

If a randomly selected group of average citizens were asked whether Supreme Court proceedings should be televised, I am sure most would answer "Yes" or perhaps "Why not?." If, however, in-

* Ed. Note: For a more extensive discussion of the override provision of § 921.141, Florida Statutes (1983), see Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31 (1985).

stead of responding to an abstract question, they were given the opportunity to view four hours of oral argument on live television on a daily basis, I feel sure they would exhibit a rather decided preference for soap operas, grade B movies, or even sumo wrestling. For the most part, what happens in our courtroom is not high drama for the average viewer.

We do provide a spectacle that usually holds the interest of a group of tourists for a span of five or ten minutes, but plenty of seats are almost always available and even though admission is free of charge, I think we have only one or two Court watchers who would even consider subscribing for season tickets. If live attendance is any barometer of the probable value of the television market for our arguments, the public demand is almost surely in the "ho-hum" bracket.

It is, however, true that there are rare occasions when the demand for seats far exceeds the supply. In perhaps a dozen cases in the ten Terms in which I have been sitting, literally hundreds of people have stood in line for hours in order to attend an argument only to be denied admission because the courtroom was filled. On those few occasions I have thought that it is indeed unfortunate that the argument was not being televised because there was a genuine public interest in seeing and hearing how the advocates for the actual litigants explained their respective positions and how they responded to questions from the bench. The average citizen, I suppose, would strongly endorse live television of a small handful of our cases, and presumably also the ceremonial proceedings when a new justice is installed, but would have little or no interest in watching most of our courtroom activities.

Students of the law would, of course, have an interest in a somewhat larger number of oral arguments, but again I would expect the number to be quite small. The Supreme Court Reports contain hundreds of opinions that are seldom read. Some law libraries contain the written briefs in all Supreme Court cases that were decided in recent decades; I have often found those briefs to be extremely helpful research tools, but I understand that some librarians are persuaded that they are used so infrequently that the cost of storing them is difficult to justify. In addition, written transcripts of our oral arguments are prepared and preserved. For most cases, it is safe to predict that law students would seldom probe behind the opinion itself, and that it will be the rare case indeed in which any insights provided by a videotape could not have been obtained from other material. It does remain true, how-

ever, that there are some cases in which virtually every student of the Court would witness the argument if it were convenient to do so. A tape of the argument in *Brown v. Board of Education* [347 U.S. 483 (1954)] or *Gideon v. Wainwright* [372 U.S. 335 (1963)] might not be a best seller on the open market, but it would surely command the interest of many law students.

Practicing lawyers must be concerned about the possible impact of the introduction of television cameras on our existing procedures. Oral arguments as they are now conducted in our Court perform an invaluable function. They produce a dialogue between counsel and the members of the Court in which all participants are focusing their attention on the same subject at the same time, and in which important new insights about how the case should be decided often develop. The introduction of television might have a distracting and adverse impact on that process that cannot be entirely foreseen. I am sure we would never follow the football example of halting the proceedings for one-minute commercial breaks, but it is reasonable to assume that live television coverage might produce some changes in the character of the dialogue that now takes place. When a process as important as that is working well, there is a natural reluctance to experiment with changes that are not necessary.

The question whether television coverage should be allowed in the Supreme Court of the United States could thus be answered in different ways. Conceivably, live coverage could be denied, but videotapes could be prepared and stored for future reference and historical use. Conceivably the reasons for rejecting live coverage on a regular basis might be outweighed by the public interest in witnessing the argument in the rare case of exceptional importance. There may be no valid reason for refusing to allow coverage of a ceremonial occasion such as the swearing-in of a new Justice or a memorial service for a deceased Justice. But, however the question is best answered, I have no doubt about where the responsibility for providing the answer resides. It is not with the news media, the average citizen, or even the students or the members of the profession who have a special knowledge of our Court. The decision must be made by the Court itself, for the Court has the ultimate responsibility for ordering its procedures in the way that will best enable it to discharge its constitutional responsibilities. The practice of denying television cameras access to our courtroom may be changed when a majority of the Court decides to do so, but not before.

In closing, let me congratulate you on your new Law Library, on the experiment which has given rise to my comments this morning, and on having as your new Dean a scholar who will probably explain what Justice is in a few well chosen words as soon as I sit down.

It has been a real pleasure sharing this occasion with you.

Thank you.

